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NO. 85-937

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF WEST VIRGINIA

CHARLES G. BROWN
Attorney General

SILAS B. TAYLOR
Deputy Attorney General
and Counsel of Record

J. BRADLEY RUSSELL
Assistant Attorney General
State Capitol, Room 26-E
Charleston, West Virginia
25305
(304) 348-2021

COUNSEL FOR PETITIONER

48 pp

QUESTION PRESENTED

Whether prejudgment interest may be awarded to the federal government and against a state, in the absence of express contractual or statutory authorization.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

THE OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 3

STATEMENT OF THE CASE. 4

SUMMARY OF ARGUMENT 10

ARGUMENT 16

A. THE FOURTH CIRCUIT ERRONEOUSLY RELIED ON COMMERCIAL LITIGATION DECISIONS 16

B. THE STARTING POINT FOR ANY ANALYSIS MUST BE WITH THE RELEVANT CONGRESSIONAL ENACTMENT 18

C. PENNHURST I BARS ANY AWARD OF INTEREST 21

D. ANY FEDERAL RULE OF DECISION SHOULD ADOPT STATE LAW. . . . 24

E. CONSIDERATIONS OF FAIRNESS PRECLUDE AN AWARD 34

TABLE OF CONTENTS (Con'd)

Page

1. As to a General Federal Rule on Awarding of Interest in Intergovernmental Litigation. . . . 35

2. As to West Virginia in Particular 36

CONCLUSION 40

TABLE OF AUTHORITIES

	Page
Board of Commissioners v. United States, 308 U.S. 343 (1939)	11,16 25,26 27,32 33,37
Commonwealth of Pennsylvania v. United States, 781 F.2d 334, n. 12 and n. 13 (3rd Cir. 1986)	23
Garcia v. San Antonio Metropolitan Transit Autority, ___ U.S. ___, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)	17
Guaranty Trust Company of New York v. West Virginia Turnpike Commission, 144 W. Va. 266, 107 S.E.2d 792 (1959)	11,24
Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981)	13,14 15,21 23,34 40
Perales v. United States, 598 F. Supp. 19 (S.D.N.Y. 1984) aff'd 751 F.2d 95 (2d Cir. 1984)	23
Royal Indemnity Company v. United States, 313 U.S. 289 (1941)	10

TABLE OF AUTHORITIES (Con'd)

	Page
United States v. Louisiana, 446 U.S. 253 (1980)	35, 36n.6
United States v. North Carolina, 136 U.S. 211 (1890).	11,25 26,29
United States v. Texas, 143 U.S. 621 (1892)	3
United States v. Yazell, 382 U.S. 341 (1966)	12,25 30,33 41

CONSTITUTIONS AND STATUTES

32 C.F.R. § 1710.25(c)	28n.6
Disaster Relief Act of 1970, Section 226(a) 84 Stat 1752 . . .	3,18, 19
1970 U.S. Code and Cong. Adm. News, p. 5497	19

THE OPINIONS BELOW

The opinion of the United States District Court for the Southern District of West Virginia, as to summary judgment, is reproduced as Certiorari Petition Appendix A and is also reported in 537 F. Supp. 388 (1982). The opinions of the district court as to liability, and as to prejudgment interest, are reproduced as Certiorari Petition Appendices B and C, respectively. Such opinions were not reported. The opinion of the Fourth Circuit Court of Appeals is reproduced as Certiorari Petition Appendix D and is reported in 764 F.2d 1028 (1985).

JURISDICTIONAL STATEMENT

The judgment to be reviewed was issued by the circuit court on June 21, 1985. A timely petition for en banc rehearing was denied by the circuit court on July 31, 1985. An application for an extension of time in which to file the petition for certiorari was granted on October 25, 1985, extending the filing deadline up to and including November 28, 1985. On February 24, 1986, this Court granted a Writ of Certiorari, limited to Question 2 presented in the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), which provides for the review by certiorari of judgments rendered by a circuit court of appeals. The Court also has original jurisdiction of this

cause of action. United States v. Texas, 143 U.S. 621 (1892).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 226(a) of the Disaster Relief Act of 1970, 84 Stat. 1752 (1970), provides:

> "Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided either by the State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest."

STATEMENT OF THE CASE

On February 26, 1972, heavy rains caused the collapse of a coal waste dam, sending over 100 million gallons of water cascading down the narrow Buffalo Creek Valley. One hundred twenty-five (125) West Virginians died that day, and the destruction and damage caused by the disaster left their scars for many years to come. Some months later, similar flooding occurred on Gilbert Creek, West Virginia, although the cost in terms of lives and money was much less. In the aftermath of these tragedies, both state and federal governments acted quickly to alleviate the suffering of the survivors.

The portion of the relief effort relevant to this case related to the

provision of temporary housing for those left homeless by the floods. The Department of Housing and Urban Development provided mobile homes, and the State of West Virginia provided land on which the mobile homes could be placed. The Army Corps of Engineers performed site preparation work. The litigation below arose from a dispute as to who was financially responsible for work performed by the Army Corp of Engineers, including the provision of utilities, drainage, grading, and similar services. The lower courts held the state liable based upon a series of letters written to the Army Corps of Engineers by subordinate state officials. Alternatively the lower courts held that the contract was based on an oral promise of a state executive official.

After sending bills and demands for payment, limited to the principal amount of 4.2 Million Dollars, to the State in the years following the flood, in 1978 the United States filed suit in the United States District Court for the Southern District of West Virginia, seeking recovery of the principal of 4.2 Million Dollars and, in addition, prejudgment interest.[1] On cross-motions

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[1] Because West Virginia Governor Arch Moore disputed that any oral promises were made, and because the letters from subordinate state officials, whose office had a budget of Twenty-five Thousand Dollars ($25,000.00), were insufficient under state law to bind the state for 4.2 Million Dollars, the state declined to pay. Additionally, federal officials, during the time period the letters were sent, had erroneously represented that the state was required by federal

(Footnote Continued)

for summary judgment, District Judge John Copenhaver ruled that any obligation the State might have to the federal government arose, not from the operation of the Federal Disaster Relief Act, but rather as a matter of contract. 537 F. Supp. 388, 396. Because material issues of disputed fact precluded summary judgment on the question of whether a contract had been formed, that issue was tried before an advisory jury which

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(Footnote Continued)
statute to undertake these acts. See, e.g. R. 934, 937. Finally, during these disasters the state executed many contracts, all of which met the requirements of state law. In fact, one such contract, complete with a Fifty Thousand Dollars ($50,000.00) advance payment, was with the Army Corps of Engineers. (R. 599-606) The only alleged contracts not complying with state law were the ones upon which this case arose.

unanimously found through special interrogatories that there was no contract, no ratification, and no authority in the state officials to enter into such a contract. United States District Judge Norman Ramsey[2] disregarded the advisory jury verdict and entered judgment against the state for the principal amount. (Cert. Pet. App. B)

After entering judgment on the liability issue, the district court issued a separate ruling declining to

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[2] District Judge John Copenhaver, the original judge, voluntarily recused himself on his own motion when it was revealed that Governor Arch A. Moore, Jr., a friend of his, would be a witness for the State. Judge Norman Ramsey of Maryland was then appointed to take his place.

award the federal government the pre-judgment interest it sought of 5.8 Million Dollars. Judge Ramsey held that as a matter of equity, the State should not bear this burden. (Cert. Pet. App. C, p. 29)

On cross-appeals the Fourth Circuit reversed the district court on the issue of prejudgment interest, holding that the federal government was entitled to prejudgment interest as a matter of right, and alternatively as a matter of equity. In determining that the United States is entitled to prejudgment interest as a matter of right in this case, the Court of Appeals took the novel step of extending a rule of federal common law, formerly applicable only to private parties, to disputes

between the federal government and sovereign states. E.g., Royal Indemnity Company v. United States, 313 U.S. 289 (1941). The Court dismissed the status of West Virginia as a sovereign state as being, in effect, irrelevant. 764 F.2d at 1031-1032. The Petition for Certiorari was granted to review this ruling.

SUMMARY OF ARGUMENT

The Fourth Circuit erred in applying a doctrine of law, developed in cases between the federal government and private litigants, to a sovereign state. The application of that doctrine to West Virginia ignored the "special status" that states have in our national system. It also ignored prior decisions of this Court relating to the award of interest

in intergovernmental litigation. See Board of Commissioners v. United States, 308 U.S. 343 (1939).

The first such decision to address the question of whether the federal government is entitled to interest in intergovernmental litigation, United States v. North Carolina, 136 U.S. 211 (1890), utilized traditional choice of law principles, and thereby applied North Carolina law. If such decision were followed in this case, then no award of prejudgment interest could be granted, as West Virginia law forbids the award of interest against the state, absent statutory authorization or an express contractual provision, neither of which is present in this case. Guaranty Trust Company of New York v.

West Virginia Turnpike Commission, 144 W. Va. 266, 107 S.E.2d 792 (1959). The only way to avoid a strict application of state law (through choice of law principles) is if the controversy in question, or the right which the government seeks to enforce, is particularly national in character. United States v. Yazell, 382 U.S. 341 (1966). In such a case a federal rule of decision may be warranted. However, the federal rule of decision must pay heed to state law, and unless "clear and substantial" national interests would "suffer major damage," state law is to be adopted as the federal rule of decision. Yazell at 352.

For the federal government to prevail they must first establish that

the controversy arises under a federal statute, and that some national interest would "suffer major damage" by applying state law.

Additionally, and because the interaction which caused this litigation is in the nature of a federal grant program, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), hereafter Pennhurst I, would prohibit an award. Pennhurst I stands for the proposition that the federal government can only attach conditions to a federal grant program to the extent that Congress has, in a "clear voice," authorized. Because no provision of the Disaster Relief Act authorizes an award of prejudgment interest, the State believes Pennhurst I applies and that

any award of interest is thereby precluded.

The specific provisions of the Disaster Relief Act and its purpose becomes the central point in determining whether Pennhurst I would preclude an award; whether a federal rule of decision would apply, and if so; whether a national interest exists which requires the overriding of state law. The Disaster Relief Act contains no provision authorizing prejudgment interest, and its purpose, of aiding the public and private sectors recover from a disaster, would actually be thwarted by an award of prejudgment interest. Accordingly, the State believes Pennhurst I precludes an award and alternatively that state law, either through

adoption or by its own force, would apply to the case, again prohibiting such an award.

Finally, the State believes that a balancing of the equities (the "federal rule" applied by the district court) would also preclude an award. The Argument sections will first address the fallacy of the Fourth Circuit's application of private litigation principles to a state and will then proceed to review the relevant congressional enactment and its purpose, inasmuch as that enactment is critical to the subsequent discussions of the applicability of Pennhurst I and on the decision on whether state law is to be adopted as the federal rule of decision. The Argument will conclude with a defense of

the district court's refusal to award interest based on a balancing of the equities test.

ARGUMENT

A. THE FOURTH CIRCUIT ERRONEOUSLY RELIED ON COMMERCIAL LITIGATION DECISIONS.

The decision of the Fourth Circuit Court of Appeals rests upon an implied holding that West Virginia's status as a sovereign state is "irrelevant," and that normal commercial litigation cases between the United States and private litigants are applicable. This identical federal argument was rejected 45 years ago in Board of Commissioners:

> "[T]he present case introduces an important factor not present in former decisions. The ligitation is not between the United States and a private litigant, but between the United States and the

> political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory." 308 U.S. at 350.

Even the most recent majority in Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S. ___, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) "recognize[d] that the States occupy a special and specific position in our constitutional system," and that the scope of federal authority "must reflect that position." 83 L. Ed. 2d at 1037. Without doubt the commercial litigation cases cited by the Fourth Circuit and the federal government do not control.

B. THE STARTING POINT FOR ANY ANALYSIS MUST BE WITH THE RELEVANT CONGRESSIONAL ENACTMENT.

The particular provision around which the current litigation revolves, section 226(a) of the Disaster Relief Act of 1970, provides:

> "Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at federal expense when he determines such action to be in the public interest." 84 Stat. 1752

Unlike the federal government, the State is unable to ascertain any language in the above statute authorizing prejudgment interest. Nor can the State

find any support for the federal government's position in the legislative history of the statute. The specific purpose of § 226(a) was noted in House Report No. 91-1524:

> "The intent of this provision is to provide primary housing to persons who have lost their dwelling place as a result of a major disaster." 1970 U.S. Code and Cong. Adm. News, p. 5497.

Prior to its enactment, the federal government was unable, through lack of authorization, to provide temporary housing to disaster victims.

Section 226(a), although the specific statutory basis, is merely one small component of an overall program designed to provide disaster relief. The original and continuing purpose of the Disaster Relief Act is also relevant

to this inquiry and its purpose was also noted by the House Report:

> "Public Law 81-875, as amended, is the basic authority for federal disaster assistance. This law provides federal assistance to State and local governments in restoring public facilities damaged or destroyed in a major disaster. The general framework of the program followed a stable pattern throughout the 1950's due to its emphasis on assisting the public sector. * * *" House Report No. 91-1524, 1970 U.S. Code and Cong. Adm. News 5486, 5490.

The backdrop of any analysis of this case must bear in mind two points: (1) the congressional intent of the statute under which this litigation arose is to assist the public and private sectors in recovering, financially and otherwise, from a disaster; and (2) that there exists no

express provision, statutorily or contractually, that would authorize an award of prejudgment interest.

C. PENNHURST I BARS ANY AWARD OF INTEREST.

Statutory silence is the basis of this argument. The oft-quoted language of Pennhurst I controls:

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' [Citations omitted]. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of

> federal moneys, it must do so unambiguously. [Citations omitted]. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." 451 U.S. 1, 17 (1981).

As a condition for the federal government's provision of mobile homes to disaster victims, the State of West Virginia provided sites for the mobile homes and the site preparation. The Disaster Relief Act is silent as to assessing interest. The silence of the Disaster Relief Act as to interest should be contrasted with other federal statutes which do speak with the required "clear voice." See 42 U.S.C. § 1396b(d)(5) [Medicaid]; 42 U.S.C. § 318(j) [Social Security]. The Second and Third Circuits contrasted the "clear

voice" of the two above provisions with the silence of the Food Stamp Act, and under a Pennhurst I analysis forbade an award of prejudgment interest. Commonwealth of Pennsylvania v. United States, 781 F. 2d 334, n. 12 and n. 13 (3rd Cir. 1986); Perales v. United States, 598 F. Supp. 19, 24-26 (S.D. N.Y. 1984) aff'd for "substantially the reasons stated in the district court's opinion" 751 F.2d 95, 96 (2d Cir. 1984).

Thus, under Pennhurst I, prejudgment interest is not awardable.[3]

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[3] The Third Circuit, through Pennsylvania, supra, and the Second Circuit, through Perales, supra, also construed the provisions of the Debt Collection Act of 1982, to reach that same result. In that act, Congress excluded "states" from those "persons"

(Footnote Continued)

D. ANY FEDERAL RULE OF DECISION SHOULD ADOPT STATE LAW.

The law of West Virginia, like most states, is that absent a specific legislative enactment or express contractual language the "state is not liable to pay interest." Guaranty Trust Company of New York v. West Virginia Turnpike Commission, 144 W. Va. 266, 270-275, 107 S.E.2d 792 (1959).

The State submits that its law as to an award of interest should be

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(Footnote Continued)
against whom interest must be assessed. 31 U.S.C. §§ 3701(c), 3713. Although this statute does not apply to the current dispute, because the contract was entered prior to the effective date of that Act, it does, however, represent an additional indicia of the national policy of not awarding prejudgment interest against states.

adopted as the federal rule of decision and as authority for this proposition, cites: United States v. Yazell, 382 U.S. 341 (1966); Board of Commissioners v. United States, 308 U.S. 343 (1939); and United States v. North Carolina, 136 U.S. 211 (1890).

The oldest of those cases, United States v. North Carolina, applied general choice of law principles in reaching its decision. In that case the United States sued North Carolina for interest on 147 bonds issued by that state and held by the United States. The Court noted that the case was one of contract law and held that:

> "The case, therefore, falls within the general rule, well established in this court, that contracts are to be governed, as to their nature, their validity and their

> interpretation, by the law of the place they are made * * *." North Carolina, 136 U.S. at 222.

Because North Carolina law did not allow interest against the state, judgment was rendered for North Carolina. The rule of decision at that time was to follow state law.[4]

The next Supreme Court case to address the question of interest between governmental entities was Board of Commissioners v. United States. That case dealt with property taxes being collected by a county in the State of

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[4] Assuming the federal government contends the basis of liability is a contract, then under North Carolina, the law of West Virginia should apply ex proprio vigore (of its own force). See also Yazell, 382 U.S. at 357.

Kansas from M-Ko-Quah-Wah. The problem was that the property of M-Ko-Quah-Wah was held in trust" by the United States pursuant to the Treaty of 1861, executed between the United States and the Pottawatomie Nation of Indians, and was thereby exempt from taxation. The United States sought interest on the taxes wrongfully collected. The federal government argued that the law of the State of Kansas was "irrelevant," whereas the county argued that state law controlled the question of prejudgment interest. The Court rejected both viewpoints and noted: "Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of

the United States * * *." 308 U.S. at 349-350. In formulating the federal rule of decision, the Court noted that:

> "Nothing seems to us more appropriate than due regard for local institutions and local interest." 308 U.S. at 351.

The Court then held that "in the absence of explicit legislative policy cutting across state interests," id. at 352, the law of Kansas should be followed. "To respect the law of interest prevailing in Kansas in no wise impinges upon" federal law. Id.

From these, the only two Supreme Court cases to address the question of whether interest is to be awarded the federal government in intergovernmental litigation, a rule of decision is distilled. State law is to be followed

unless the right to be enforced is found in federal law, in which case State law is nevertheless adopted absent a countervailing national legislative policy. In both North Carolina and Board of Commissioners state law controlled and interest was not awarded.

In the final case, Yazell, this Court dealt with an SBA loan which was granted in the aftermath of a disaster in Texas. The issue before the Court was whether the federal government could reach the separate property of the delinquent debtor's wife, which she had pledged as collateral, where state law made such pledge unenforceable. The Court stated the rule on selecting the applicable law:

> "Both theory and the precedents of this Court teach us

> solicitude for state interests. . . . They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." Yazell, 382 U.S. at 352.

The federal interest advanced by the federal government today is the same advanced in Yazell. The federal government merely asserts the interest of any creditor: "Every creditor wants to collect," and collect as much as possible. Id. at 348. This particular federal interest was unable to overcome the interest of respecting an obsolete state law (which had been repealed at the time the case was heard) in Yazell. 382 U. S. at 351. The United States,

having no federal interest distinct from that of any other creditor, was held to be subject to the same state laws as were all other creditors. If the federal interest of collection could not outweigh a repealed Texas law, then, a fortiori, it ought not to outweigh valid West Virginia law.

In making this analysis on selection of law, it is important to remember the purpose of the Disaster Relief Act, which, as to this case, would be to help the State of West Virginia overcome the financial impact of the two disasters. Certainly the federal interest in financially assisting West Virginia does not conflict with adopting the state rule of decision forbidding an award of interest.

Board of Commissioners tells us that state law should be adopted absent "explicit legislative policy cutting across state interests," and 27 years later, Yazell says adoption of state law should be overridden only where "clear and substantial" federal interests will "suffer major damage." What is this national interest which justifies ignoring West Virginia law? The statute is silent. The regulations contain no provision that cuts across state law.[5] One might question how the federal position meshes with the overriding purpose of the Disaster Relief Act.

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[5] As a matter of fact 32 C.F.R. § 1710.25(c) provided in 1972 that procurement of services and supplies should comply with state and local law.

Does seeking 5.8 Million Dollars in interest from a state government assist that state government in overcoming the adverse financial impact of a disaster? Quite clearly, and in the context of the Disaster Relief Act, the position propounded by the federal government does violence to the very cause they are pledged to support.

Under both Board of Commissioners and Yazell, West Virginia law on the award of interest should have been adopted. Not only is there no explicit legislative policy that warrants a new rule of decision, but quite frankly, the federal government's proposed new rule is inconsistent with the controlling congressional enactment. The phrases "choice of law" or "selection of law"

are somewhat misleading considering the facts of this case. Since there is no explicit legislative policy on prejudgment interest, only one "choice" exists --the law of West Virginia.

E. CONSIDERATIONS OF FAIRNESS PRECLUDE AN AWARD.

Although the State believes a proper reading of Pennhurst I and/or the adoption of state law as the federal rule of decision would preclude relief, we feel it necessary to support the balancing of the equities test utilized by the district court in its decision refusing the federal government's demand for interest.

1. As to a General Federal Rule on Awarding of Interest in Intergovernmental Litigation.

Fair is fair. This Court in 1980 held in a dispute between Louisiana and the United States, that:

> "[I]n the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." United States v. Louisiana, 446 U.S. 253, 264-265 (1980).

If in litigation between a state and the federal government, a state cannot recover interest absent a federal statute or an express contractual provision, how is it fair to apply a different rule when the situation is reversed? If a state cannot get interest when the federal government wrongfully withholds the state's money,

then the reverse should also be true.[6] What is good for the goose should also be good for the gander.

2. As to West Virginia in Particular

The State of West Virginia is not a rich state. Whether one looks to the depressed steel mills in the northern panhandle or the southern coalfields idled by the oil-glut, the unemployment and poverty are rampant. For all of the last several years, West Virginia has led the nation in unemployment. A state with one of the lowest per capita income levels; one of the highest rates of poverty; and an economy that has not

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[6] The State would assert that Louisiana, at n. 4, stands for this very same rule being applied to states.

rebounded. In Board of Commissioners this Court stated that in making a decision to award interest "nothing seems more appropriate than due regard * * * for local interests." 308 U. S. at 351. The above are the local interest that the 5.8 Million Dollar award in this case would affect.

To the federal government 5.8 Million Dollars represents a few pennies per taxpayer, but to financially strapped and economically depressed West Virginia it is a fortune--three dollars ($3.00) for every man, woman, and child in West Virginia. A comparable judgment (on a per capita basis) against the United States would be $750,000,000.00. If one were to consider the relative sizes of the state and federal budgets,

it would take a judgment against the federal government of 4.2 Billion Dollars to have an impact on the federal government that is comparable to the impact of the judgment below on West Virginia.

Also to be considered in the balancing should be the purpose of the federal enactment under which the dispute arose.[7] The function of the

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[7] The Fourth Circuit, in addition to failing to even consider the purpose of the enactment in its balancing dicta, inexplicably failed to defer to the District Court, applied incorrect criteria, and based its decision on critical factual misstatements. For example, the Fourth Circuit stated that the State appropriated money for this debt in 1972 and has since earned interest on such money. No such appropriation occurred and the State is not earning any interest on said nonexistent appropriation.

enactment is to target needy populations and spread the cost of disasters among all federal taxpayers. The enactment recognizes the inability of state and local government to amass sufficient resources to meet the large and unpredictable demands occasioned by disasters. By seeking prejudgment interest, the federal government is invading the same state resources that Congress deemed inadequate, as well as jeopardizing state services to the the needy population Congress targeted for relief. Clearly and unequivocably the congressional purpose of assisting a state government's recovery from the devastating financial impact of a disaster is not served by an award of prejudgment interest.

The State believes that the district court decision balancing the equities was correct. Considerations of fairness weigh in favor of West Virginia and preclude any award of prejudgment interest.

CONCLUSION

In determining whether to award prejudgment interest in this case, the starting point of the analysis should be the basis of the dispute. If the underlying dispute was for reasons that are in the nature of conditions attached to receiving federal monies, then Pennhurst I controls. The lack of a specific congressional enactment as to

awards of interest precludes prejudgment interest being imposed as an additional condition. If, however, the situation is solely contractual, then the question becomes one of what the federal rule of decision requires. Because of the absence of a national interest that requires overriding state law, the adoption of state law as the federal rule of decision is mandated. Yazell. As state law forbids an award of interest, under the facts of the case, then an award of interest against the State is precluded.

Accordingly and for the foregoing reasons, the State of West Virginia asks

that the Fourth Circuit decision be reversed.

Respectfully submitted,

CHARLES G. BROWN
Attorney General

Silas B Taylor

SILAS B. TAYLOR
Deputy Attorney General
and Counsel of Record

J Bradley Russell

J. BRADLEY RUSSELL
Assistant Attorney General

State Capitol, Room 26-E
Charleston, West Virginia
25305
(304)348-2021

Counsel for Petitioners.